Supreme Court, U.S.
FILED

021365 MAR 14 2003

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

Donald & Susan Zimmerman,

Petitioners,

v.

Commissioner of Internal Revenue,

Respondent.

On Petition for a Writ of Certiorari
To the Tenth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

Donald and Susan Zimmerman, Pro per
606 West Mineral King, Suite A
Visalia, California
Telephone: (559) 733-4550

Richard Farber, John Nolet
Tax Division, DOJ
P.O. Box 502
Washington, DC 20044
Counsel for respondent

29 pp

QUESTIONS PRESENTED

The Tenth Circuit Court of Appeals affirmed decisions of the United States Tax Court that stated Susan Zimmerman's petition was so lacking in merit it did not constitute a petition. The Tax Court ruled Donald Zimmerman's petition was also not a real petition and claimed he filed his notice of appeal untimely. These holdings raise five substantial federal questions warranting review by this Court:

1. Whether the court of appeals was also non-responsive to the petition.
2. Whether an entire statement of facts may be construed as "frivolous and groundless arguments" and, or to not exist consistent with fundamental principals of fairness and due process.
3. Whether the legal opinions of a non-party, non-witness may be accepted by a judge as true consistent with principals of fairness and due process.
4. Whether both the trial court and the appeals court failed to apply this Court's standard to a motion to dismiss.
5. Whether the refusal to apply this Court's standard was a denial of the right to due process.

PARTIES TO THE PROCEEDING

Donald and Susan Zimmerman are the petitioners. The commissioner of Internal Revenue is the respondent.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....1
PARTIES TO THE PROCEEDING.....1
OPINIONS BELOW.....3
JURISDICTION 3

CONSTITUTIONAL PROVISIONS AND
STATUTES INVOLVED 4
STATEMENT OF THE CASE 4
I. THE UNDERLYING LITIGATION 5
A. The Tax Court decision 6
1. The burden of proof for a motion to dismiss....6
2. There is doubt 7
3. Petitions have a factual and legal basis 7
4. Both courts based their opinions on the
opinions of defense lawyers....8
II. PROCEEDINGS IN THE TENTH CIRCUIT
COURT 9
A. FEDERAL ISSUES RAISED BELOW AND NOT
RULED ON 9
REASONS FOR GRANTING THE PETITION....9
I Review is warranted because confidence
in the system is eroded 10
II Review is warranted because the abuse is
nation-wide 10
A. Shocking actions of tax court judge Swift 12
B. Due process is an empty political phrase....12
CONCLUSION....13
APPENDIX....14
A. Tax Court Decision, Donald 15
B. Tax Court Decision, Susan....19
C. Tenth Circuit Decision 23
D. Tenth Circuit rehearing denial, Susan 27
E. Tenth Circuit rehearing denial, Donald....28

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Donald and Susan Zimmerman, petition this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit. The panel's decision is in plain contravention of the facts, current

law and holdings of this Court. The Tenth Circuit panel essentially denied review and its end was to plainly deny the Zimmermans due process and a fair trial. This Court has held: "It is a necessary and well-settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights..." Smithsonian Institution v. St. John, 214 U.S. 19, 28 (1909). Because these flagrant violations of well-established basic principals appears to be nationwide and shock the conscience, review is warranted by this Court to stop the lawless actions of the inferior courts.

OPINIONS BELOW

The opinions of the Tenth Circuit (02-9004, 02-9005) panel are unreported. The tax court are numbers 8124-01 and 8127-01. These opinions are reproduced in the appendix.

JURISDICTION

The orders denying rehearing were entered on January 7, 2003. The jurisdiction of this Court rests upon 28 USC § 1254(a).

As shown below, substantial federal questions were raised in both the tax court and the court of appeals and neither court addressed them:

"We are aware that a right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right...as if it had been specifically referred to and the right directly

refused." Chapman v. Goodnow's Admin'r., 123 US 540, 548 (1887).

This Court has also held: "It is a necessary and well-settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights..." Smithsonian Institution v. St. John, 214 U.S. 19, 28 (1909).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment to the United States Constitution provides that "No person shall...be deprived of life, liberty, or property, without due process of law..."

STATEMENT OF THE CASE

For approximately four years, individuals doing business as (D/B/A) the "Internal Revenue Service" (IRS) have been trying to take property from the Zimmermans. Velia Calvin (Calvin), allegedly representing the "IRS," set up several dates to meet with the Zimmermans. The Zimmermans were willing to meet with Calvin and wrote telling her they would meet with her together with counsel and a court reporter. Zimmerman told Calvin they wanted to know the facts her legal opinions were based on. Calvin cancelled each meeting and refused to meet with the Zimmermans.

The Zimmermans requested an administrative hearing or appeals consideration, and were refused. Instead of speaking with the Zimmermans, Calvin issued over sixty-five "summonses." Zimmerman filed a petition to quash on the grounds there were no facts to support Calvin's many legal opinions. Calvin's lawyer filed a motion for summary enforcement, an affidavit of good faith and requested a hearing. Once the hearing was set, Zimmerman, through counsel, issued and served a subpoena on Calvin to attend the hearing.

The assigned magistrate cancelled the hearing without explanation. Another hearing was set by Calvin's lawyer; another subpoena was issued and served on Calvin and again the hearing was cancelled without explanation. The motion for summary enforcement was granted without a hearing. More summonses were issued and Zimmerman's counsel filed a petition late.

The men and women D/B/A the "IRS" sent the Zimmermans a letter threatening a "NOTICE OF DEFICIENCY." The Zimmermans *again* offered to sit down and settle the matter so court could be avoided. The men and women D/B/A the "IRS" were again non-responsive. Four notices were mailed to the Zimmermans.

I. UNDERLYING LITIGATION.

Four identical petitions were filed into the tax court (two against the Zimmermans and two against trusts they are trustees of). The two against the trusts represent a "whipsaw" position and are actually attacks against the Zimmermans themselves. The grounds were: based on the complete non-responsiveness to factual inquiries, unwillingness to meet and the avoidance of cross-examination, the legal opinions of the three "IRS" employees (Calvin, John Tam, area director) were arbitrary: "But the maxim applies, *quod non apparet non est.* The fact not appearing is presumed not to exist." Shepard v The Schooner Clara, 102 US 200, 202. Being arbitrary the tax court is obligated to set-aside the notices, Helvering v. Taylor, 293 U.S. 507, 514.

The commissioner's lawyer, Dale Zusi (Zusi), filed two motions to dismiss the Zimmerman's petitions (8124-01, 8127-01). However, Zusi filed affirmative answers to the trust petitions (#8125-01, #8126-01).

Zusi alleged the two Zimmerman petitions were so lacking in merit they did not constitute petitions. Zusi alleged

there was no lettered statement of facts, no numbered assignments of error and contained nothing but frivolous legal arguments. The Zimmermans' response included pointing out this Court's standard to prevail in a motion to dismiss, the lettered statement of facts was "A-T," and their statement of facts was not mere legal opinions. Judge Wells agreed with Zusi and granted the motions. All post judgment motions were denied without explanation. Notices of appeal were mailed and Donald Zimmerman's was destroyed by the post office. The tax court and the Tenth Circuit panel refused to accept the notice as timely despite knowing all pleadings were mailed together.

A. The tax court decision. The tax court, judge Wells, was non-responsive and acted as a rubberstamp for the IRS. He construed facts as arguments and refused to comply with the rules of court, the due process clause and the holdings of this Court when he granted the motions to dismiss. The intent of his rulings was to deny the Zimmermans due process and a fair trial.

1. The burden of proof for a motion to dismiss. This Court has long held the burden of proof for a motion to dismiss is "beyond doubt;" this is higher than the burden in a murder trial: "It is ***axiomatic*** that a complaint should not be dismissed unless "it appears ***beyond doubt*** that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957)..." McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232, 246 (1980) (emphasis added).

This court has held: "Unless there is "`***indisputably absent any factual or legal basis***'" for the wrong asserted in the complaint, the trial court, "[i]n a close case," should permit the claim to proceed at least to the point where responsive pleadings are required. Ibid. (citation omitted)." Neitzke v. Williams, 490 U.S. 319, 323 (1989) (emphasis added).

This Court has also long held: "...it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, ***the allegations of the complaint should be construed favorably to the pleader***." Scheurer v. Rhodes, 416 U.S. 232, 236 (1974) (emphasis added).

2. There is doubt. Doubt is established because four identical petitions were filed. The other two petitions are in ***pretrial*** and are set for an April tenth 2003 trial in the tax court in Salt lake City, Utah. Both courts flagrantly disregarded federal policy, the due process clause and the standards of this Court when the motions were granted and affirmed: "No matter how unlikely it may seem that plaintiff will prove its entitlement to relief, ***federal policy favors disposition on the proofs rather than on the pleadings***." 6th Camden Corp. v. Evesham TP., Burlington Cty., 420 F.Supp. 709, 720 (1976) (emphasis added).

The commissioner's entire case is based upon three witnesses. It is irrational to believe these witnesses are somehow ***infallible*** or that it is "beyond doubt" they could not be impeached and their testimony, including the "NOTICE OF DEFICIENCY," be stricken in its entirety. This casts the necessary doubt to be fatal to the motion.

Also, pretrial discovery in both cases in the tax court has provided the following admissions from the "IRS" to wit: "The notice of deficiency against the trust is based upon legal opinions and not facts" and "The notice of deficiency is arbitrary." These admissions prompted the commissioner's lawyer, Richard Kennedy, to file an untimely "motion to withdraw deemed admissions." With these admissions the only doubt to speak of is *if the commissioner can make his case*.

3. Petitions have a factual and legal basis. The facts are the "IRS" made legal opinions against the

Zimmermans. The Zimmermans asked for those facts and the "IRS" refused. There is a presumption there are no facts: "But the maxim applies, *quod non apparet non est*. The fact not appearing is presumed not to exist." Shepard v The Schooner Clara, 102 US 200, 202. Without facts, the opinions, the deficiency, is arbitrary and should be set-aside: "The fact that the Commissioner's determination of a deficiency was arbitrarily made may reasonably be deemed sufficient to require the Board to set it aside." Helvering v. Taylor, 293 U.S. 507, 514.

Without any facts to support their legal opinions, the "deficiencies" are "naked assessments" and "The determination of tax due then may be one "***without rational foundation*** and excessive," and not properly subject to the usual rule with respect to the burden of proof in tax cases. Helvering v. Taylor, 293 U.S. 507, 514-515 (1935)." United States v. Janis, 428 U.S. 433, 442 (1976) (emphasis added).

4. Both courts refused to construe the facts favorably to the Zimmermans. The only reasonable presumption raised by the refusal to sit down with the Zimmermans and provide the facts their legal opinions were based, including the vehement refusal to submit to cross-examination (this continues still with tax court judge Swift refusing to permit discovery and cross-examination of the three witnesses at trial), is there are no facts, *quod non apparet non est*.

Both courts were required to construe the non-responsiveness favorably to the Zimmermans. Instead, both courts construed the refusal to meet with the Zimmermans as "frivolous and groundless arguments." This is in direct contravention of this Court's holdings, Scheurer v. Rhodes, 416 U.S. 232, 236 (1974) "And, the complaint is to be liberally construed in favor of plaintiff." Jenkins v. McKeithen, 395 U.S. 411, 422 (1969).

5. Both courts based their opinions on the

opinions of defense lawyers. In both cases the lower courts based their opinions on nothing more than the opinions of defense lawyers who were neither parties nor witnesses in the litigation. Had the courts relied on the opinions of the three witnesses, then the necessary doubt to overcome the motion to dismiss is cast by the discovery rules and Rules 602 and 607 of the FRE.

The courts based their opinions on either the opinions of the defense lawyers, or their own personal opinion in contravention of Rule 605 FRE. In either case due process is denied because the Zimmermans were not permitted to confront those acting as witnesses against them.

II. PROCEEDINGS IN THE TENTH CIRCUIT COURT.

On appeal the Tenth Circuit panel took two full pages of text to explain why Donald Zimmerman's appeal was dismissed. However, Susan Zimmerman's review, which included a burden of proof higher than a murder case, was given one sentence. Not one of the issues was discussed; the panel stated its agreement with the tax court. This lack of explanation makes it appear to be a lack of review and a rubberstamp of the erroneous ruling of the tax court.

A motion for re-hearing en banc was filed and denied without explanation.

A. FEDERAL ISSUES RAISED BELOW AND NOT RULED ON. In each proceeding the foregoing federal issues were raised and each court was non-responsive. The burden of proof was not mentioned in either decision.

REASONS FOR GRANTING PETITION.

There are few reasons more important than those pre-

sented by this case. The public perception of the judicial system is damaged when judges flagrantly disregard long held principals, rules of procedure and the holdings of this Court. Despite knowing the law, and having it presented over and over again in pleadings, the tax court and the Tenth Circuit panel knowingly, and deliberately refused to comply with the due process clause and the holdings of this Court.

I. **Review is warranted because confidence in the system is eroded.** Review is warranted because both courts disregarded the holdings of this Court. Confidence in the system is lost when judges themselves refuse to comply with the rules. As shown below, unless this Court exercises its inherent supervisory jurisdiction, the lower courts will continue their lawless rule.

Evidence of this lawlessness is demonstrated by tax court judge Swift who is presiding over the Zimmermans' two other petitions, numbers 8125-01 and 8126-01.

Judge Swift is permitting a defense lawyer for the "IRS" to refuse to comply with discovery, judge Swift has refused to permit cross-examination of every witness against Zimmerman, has given the same "IRS" lawyer legal advice at least three times and has claimed to have delegated the "full authority of the [United States Tax] court" to this defense lawyer. This same judge is even acting as a witness against the Zimmermans. These shocking actions have prompted the Zimmermans to petition the Tenth Circuit Court of Appeals for a writ of mandamus after judge Swift refused to recuse himself in accordance with 28 U.S.C. 455(a).

II. **Review is warranted because the abuse is nation-wide.** The refusal to comply with the rules is not limited to this case; it is institutional and nation-wide. Zimmerman had two petition to quash cases where all discovery and cross-examination was denied. In the two tax

court cases the assigned judge, judge Swift, is denying Zimmerman the opportunity to cross-examine the only witnesses against them.

In Nis Family Trust v. Commissioner, 115 TC 523 (2000), the "IRS" refused to comply with discovery and refused to attend depositions. Despite this, the tax court granted judgment. Fifty thousand dollars in sanctions precluded review. This itself is a *deplorable* tactic of trial judges.

There is also the unreported case of Campbell v. Commissioner, No. 01-71355 from the Ninth Circuit court of appeals. The same errors were committed by tax court judge Wells and "review" consisted of a rubberstamp similar to this case. Unreported case #99-4286-GG, Case v. Webb, from the Eleventh Circuit Court of Appeals is another case where cross-examination was brazenly denied in the trial court and the appeal panel failed to mention the words "cross-examination" in the "decision." They failed to mention the words when this Court has consistently held: "a denial of cross-examination without waiver . . . would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." Smith v. Illinois, 390 U.S. 129, 131 (1968). Despite being an "error of the first magnitude," the lower courts act as if it is a "harmless error" that doesn't warrant being mentioned.

There are also many other cases where tax court judges refuse to comply with the rules. This is why so many people who have been to the tax court characterize it as an "IRS rubberstamp."

This denial of cross-examination is rampant in not only federal cases, but in state traffic and tax cases as well. The California Board of Equalization and Arizona Board of Tax Appeals are just two examples of this. The California Court of Appeals recently upheld a wholesale denial of cross-examination by "presuming" there were probably even *more* witnesses the plaintiff's could not cross- examine, unreported

case number D039211. In that case the Board admitted the testimony of each witness was *inadmissible*: "the witnesses do not have personal knowledge of the facts of your case, your subpoenas were properly denied." Yet despite this, the unchallenged testimony was accepted: "with regard to the motion to exclude evidence, you have not provided any legal argument in support of your motion..." The Board acted as if the due process clause and § 702 of the California evidence code did not exist: "(a) Subject to Section 801, the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter."

A. Shocking actions of tax court judge Swift. As shown earlier, the recent actions of tax court judge Swift, the judge presiding over the Zimmermans other two petitions, shock the conscience. They include practicing law from the bench (a "high misdemeanor 28 U.S.C. 451), delegating the "full authority of the [United States Tax] court to a defense lawyer and a wholesale denial of cross-examination.

Judge Swift's flagrant abuse brings the judicial system into further disrepute and destroys the public's perception of said system. No one familiar with the Zimmermans' case would have any confidence to file a petition into the tax court. Judge Swift (and judge Wells) makes the tax court look like a mere rubberstamp for the "IRS." Why file a petition when a judge construes facts as arguments? No rational person would file a petition in the tax court knowing they are not going to get discovery, the judge will deny cross-examination of every single witness, give the "IRS" legal advice and the "full authority of the court,' and act as a witness himself.

B. Due process is an empty political phrase. If judges can get away with construing facts as mere arguments then due process is nothing more than political rhetoric. Pretending a statement of facts (A-T) is missing is chilling

and shocks the conscience. There can be no due process if judges are permitted to continue such acts.

A burden of proof is put into place to ensure each litigant gets due process and a fair trial. This Court has declared, *in no uncertain terms*, what that burden is with a motion to dismiss: "It is ***axiomatic*** that a complaint should not be dismissed unless "it appears ***beyond doubt*** that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957)..." McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232, 246 (1980) (emphasis added).

This is why motions to dismiss are not favored by federal policy: "Motions to dismiss are generally viewed with disfavor and rarely granted." Wrenn v. State of Kansas, 561 F.Supp. 1216, 1220 (1983). In practice motions to dismiss are granted routinely in the tax court and against the "IRS" in general.

Due process is denied when a judge, on nothing more than a motion, silently decides it is "beyond doubt" the legal opinions of a revenue agent is not, and could not be arbitrary. Due process is denied when a reviewing court fails to mention this incredibiy high burden in their decision. The failure to mention the burden in its decision is clearly to deny the Zimmermans due process and a fair trial, Smithsonian Institution v. St. John, 214 U.S. 19, 28 (1909).

CONCLUSION

For the foregoing reasons this Court should grant the petition for a writ of certiorari.

Submitted this 14th day of March 2003.

Susan Zimmerman

Donald Zimmerman

UNITED STATES TAX COURT
Washington, D.C. 20217

DONALD ZIMMERMAN,	)	
	)	
Petitioner,	)	
	)	
v	)	Docket no. 8124-01
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
	)	
Respondent.	)	

ORDER OF DISMISSAL AND DECISION

On March 28, 2001, respondent issued a joint notice of deficiency to Donald and Susan Zimmerman determining deficiencies in, and accuracy-related penalties under section 6662(a) on, the Zimmermans' Federal income taxes for 1996 and 1997. The deficiencies in income taxes arise principally from respondent's determination that the Zimmermans failed to report various items of income, including income from a trust that respondent determined was a sham trust with no economic substance.

Donald and Susan Zimmerman filed separate petitions for redetermination with the Court. (Hereinafter all references to petitioner are to Donald Zimmerman). At the time that the petition was filed, petitioner resided in Visalia, California.

The petition filed in his case includes allegations that: (1) the notice of deficiency is arbitrary and void because there is no evidence that petitioner transferred his property rights to the United States government; (2) respondent bears the burden of proving that the Internal Revenue Code is binding on

petitioner; and (3) the act of imposing a tax is tantamount to theft. Significantly, the petition does not deny the receipt of unreported income nor does the petition deny that the trust in issue was not a sham trust with no economic substance. See Parker v. Commissioner, 117 F.3d 785 (5th Cir. 1997); White v. Commissioner, T.C. Memo. 1997-459.

On August 13, 2001, respondent filed a motion to dismiss for Failure to State a Claim Upon Which Relief May Be Granted. Respondent included within the motion a request that "the Court award damages to the United States in an appropriate amount, pursuant to I.R.C. § 6673, based upon the fact that petitioner has instituted these proceedings primarily for the purpose of delay and/or petitioner's position in the present case is frivolous or groundless."

By Order dated August 14, 2001, petitioner was directed to file a proper amended petition setting forth with specificity each error allegedly made by respondent in the determination of the deficiencies and separate statements of every fact upon which the assignments of error are based.

The matter was called for hearing at the Court's motions Sessions in Washington D.C., on September 19, 2001, and September 26, 2001. Counsel for respondent appeared at both hearings and presented argument in support of respondent's motion to dismiss. Although there was no appearance by or on behalf of petitioner at either hearing, the Court did receive from petitioner an amendment to petition that repeated the same arguments set forth in the petition.

Rule 34(b)(4) requires that a petition filed in this Court contain a clear and concise assignments of each and every error that the taxpayer alleges to have been committed by the Commissioner in the determination of the deficiencies and the penalties in dispute. Rule 34(b)(5) further requires

that the petition contain a clear and concise lettered statements of facts on which the taxpayer bases the assignments of error. See Jarvis v. Commissioner, 78 T.C. 646, 658 (1982).

Neither the petition nor the amendment to petition filed in ther case satisfies the requirements of Rule 34(b)(4) and (5). Specifically, there is neither assignment of error nor allegation of fact in support of any justiciable claim. Rather, petitioner's pleadings contain nothing but frivolous and groundless arguments. Under the circumstances, we see no need to catalog these arguments and painstakingly address them. As the Court of Appeals for the Fifth Circuit has remarked: "We perceive no need to refute these arguments with somber reasoning and copious citation of precedent; to do so might suggest that these arguments have some colorable merit." Crain v. Commissioner, 737 F.2d 1417, 1417 (5th Cir. 1984).

Because petitioner's pleadings fail to state a claim upon which relief can be granted, we will grant the part of which relief can be granted, we will grant that part of respondent's motion that seeks to dismiss ther case. See Scherping v. Commissioner, 737 F.2d 478 (8th Cir. 1984); Rules 34(a)(1), 123(b).

We turn now to respondent's request that we impose a penalty pursuant to section 6673.

Section 6673(a)(1) authorizes the Tax Court to require a taxpayer to pay to the United States a penalty not in excess of $25,000 whenever it appears that proceedings have been instituted or maintained by the taxpayer primarily for delay or that the taxpayer's position in such proceeding is frivolous or groundless. Although it appears that petitioner instituted ther proceeding primarily for purposes of delay, we will not impose a penalty pursuant to section 6673(a)(1).

Nevertheless, we will take ther opportunity to admonish petitioner that the Court may impose such a penalty should he return to the Court and advance similar arguments in the future.

Upon due consideration and for cause, it is hereby

ORDERED: That so much of respondent's Motion To Dismiss For Failure To State A Claim Which Relief May Be Granted, filed August 13, 2001, that moves to dismiss is granted. It if further

ORDERED AND DECIDED: That petitioner is liable for deficiencies in, and accuracy-related penalties on, her Federal incomes taxes for the years and in the amounts as follows:

		Accuracy-Related Penalty
Year	Deficiency	Section 6662(a)
1996	$200,460	$40,093
1997	$218,872	$43,774

It is further

ORDERED: That so much of respondent's Motion To Dismiss For Failure To State A Claim Which Relief May Be Granted, filed August 13, 2001, that moves for the imposition of a penalty under Section 6673(a)(1) is denied.

(Signed) Thomas B. Wells

Thomas B. Wells
Chief Judge

Entered: **OCT 5 2001**

UNITED STATES TAX COURT
Washington, D.C. 20217

SUSAN ZIMMERMAN	)
	)
Petitioner,	)
	)
v.	)Docket no. 8127-01
	)
COMMISSIONER OF INTERNAL REVENUE,	)
	)
Respondent.	)

ORDER OF DISMISSAL AND DECISION

On March 28, 2001, respondent issued a joint notice of deficiency to Donald and Susan Zimmerman determining deficiencies in, and accuracy-related penalties under section 6662(a) on, the Zimmermans' Federal income taxes for 1996 and 1997. The deficiencies in income taxes arise principally from respondent's determination that the Zimmermans failed to report various items of income, including income from a trust that respondent determined was a sham trust with no economic substance.

Donald and Susan Zimmerman filed separate petitions for redetermination with the Court. (Hereinafter all references to petitioner are to Susan Zimmerman). At the time that the petition was filed, petitioner resided in Visalia, California.

The petition filed in her case includes allegations that: (1) the notice of deficiency is arbitrary and void because there is no evidence that petitioner transferred her property rights to the United States government; (2) respondent bears the bur-

den of proving that the Internal Revenue Code is binding on petitioner; and (3) the act of imposing a tax is tantamount to theft. Significantly, the petition does not deny the receipt of unreported income nor does the petition deny that the trust in issue was not a sham trust with no economic substance. See Parker v. Commissioner, 117 F.3d 785 (5th Cir. 1997); White v. Commissioner, T.C. Memo. 1997-459.

On August 13, 2001, respondent filed a motion to dismiss for Failure to State a Claim Upon Which Relief May Be Granted. Respondent included within ther motion a request that "the Court award damages to the United States in an appropriate amount, pursuant to I.R.C. § 6673, based upon the fact that petitioner has instituted these proceedings primarily for the purpose of delay and/or petitioner's position in the present case is frivolous or groundless."

By Order dated August 14, 2001, petitioner was directed to file a proper amended petition setting forth with specificity each error allegedly made by respondent in the determination of the deficiencies and separate statements of every fact upon which the assignments of error are based.

The matter was called for hearing at the Court's motions Sessions in Washington D.C., on September 19, 2001, and September 26, 2001. Counsel for respondent appeared at both hearings and presented argument in support of respondent's motion to dismiss. Although there was no appearance by or on behalf of petitioner at either hearing, the Court did receive from petitioner an amendment to petition that repeated the same arguments set forth in the petition.

Rule 34(b)(4) requires that a petition filed in this Court contain a clear and concise assignments of each and every error that the taxpayer alleges to have been committed by the Commissioner in the determination of the deficiencies

and the penalties in dispute. Rule 34(b)(5) further requires that the petition contain a clear and concise lettered statements of facts on which the taxpayer bases the assignments of error. See Jarvis v. Commissioner, 78 T.C. 646, 658 (1982).

Neither the petition nor the amendment to petition filed in ther case satisfies the requirements of Rule 34(b)(4) and (5). Specifically, there is neither assignment of error nor allegation of fact in support of any justiciable claim. Rather, petitioner's pleadings contain nothing but frivolous and groundless arguments. Under the circumstances, we see no need to catalog these arguments and painstakingly address them. As the Court of Appeals for the Fifth Circuit has remarked: "We perceive no need to refute these arguments with somber reasoning and copious citation of precedent; to do so might suggest that these argument. have some colorable merit." Crain v. Commissioner, 737 F.2d 1417, 1417 (5th Cir. 1984).

Because petitioner's pleadings fail to state a claim upon which relief can be granted, we will grant the part of which relief can be granted, we will grant that part of respondent's motion that seeks to dismiss ther case. See Scherping v. Commissioner, 737 F.2d 478 (8th Cir. 1984); Rules 34(a)(1), 123(b).

We turn now to respondent's request that we impose a penalty pursuant to section 6673.

Section 6673(a)(1) authorizes the Tax Court to require a taxpayer to pay to the United States a penalty not in excess of $25,000 whenever it appears that proceedings have been instituted or maintained by the taxpayer primarily for delay or that the taxpayer's position in such proceeding is frivolous or groundless. Although it appears that petitioner instituted ther proceeding primarily for purposes of delay, we will not

impose a penalty pursuant to section 6673(a)(1). Nevertheless, we will take ther opportunity to admonish petitioner that the Court may impose such a penalty should she return to the Court and advance similar arguments in the future.

Upon due consideration and for cause, it is hereby

ORDERED: That so much of respondent's Motion To Dismiss For Failure To State A Claim Which Relief May Be Granted, filed August 13, 2001, that moves to dismiss is granted. It if further

ORDERED AND DECIDED: That petitioner is liable for deficiencies in, and accuracy-related penalties on, her Federal incomes taxes for the years and in the amounts as follows:

		Accuracy-Related Penalty
Year	Deficiency	Section 6662(a)
1996	$200,460	$40,093
1997	$218,872	$43,774

It is further

ORDERED: That so much of respondent's Motion To Dismiss For Failure To State A Claim Which Relief May Be Granted, filed August 13, 2001, that moves for the imposition of a penalty under Section 6673(a)(1) is denied.

(Signed) Thomas B. Wells

Thomas B. Wells
Chief Judge

Entered: **OCT 5 2001**

FILED
United States Court of Appeals
Tenth Circuit
Dec. 9 2002
PATRICK FISHER
Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SUSAN ZIMMERMAN,

Petitioner – Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent – Appellee.

No. 02-9004
(Tax Court no. 8127-01)

DONALD ZIMMERMAN,

Petitioner – Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent – Appellee.

No. 02-9005
(Tax Court no. 8124-01)

ORDER AND JUDGMENT*

Before SEYMOUR, EBEL, and O'BRIEN, Circuit Judges

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

After examining the briefs and appellate record, the panel has determined, unanimously that oral argument would not materially assist the determination of these appeals. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34(a)(1). The cases are therefore ordered submitted without oral argument.

We have consolidated these appeals for the purpose of disposition. In No. 02-9004, Susan Zimmerman petitions for review of decisions of the Tax Court granting the respondent's motion to dismiss her petition and denying her motion for reconsideration/motion for new trial. Similarly in No. 02-9005, Donald Zimmerman petitions for review of decisions of the Tax Court dismissing his petition and denying his motion for reconsideration/motion for new trial. We dismiss Donald Zimmerman's petition for a lack of jurisdiction. We affirm the Tax Court's decisions concerning Susan Zimmerman's petition.

1. **Timeliness of Donald Zimmerman's petition for review**

At the outset, we must address whether we have jurisdiction over Donald Zimmerman's petition for review. Under Fed. R. App. P. 13(a)(1), a petitioner must file his petition for review within ninety days of the entry of the Tax Court's decision. If the petitioner makes a timely motion to vacate or revise the Tax Court's decision, however, the time to file a notice of appeal runs from the entry of the order disposing that motion. *Id.* 13(a)(2).

The Tax Court entered a final order in Donald

Zimmerman's case on October 5 2001. He filed a timely motion for reconsideration on December 4 2001. The Tax Court denied his motion on December 7, 2001. Mr. Zimmerman's former counsel mailed a notice of appeal to the Tax Court 125 days later, on April 11 2002.

This April 11, 2002 notice was untimely. Mr. Zimmerman's former counsel, however, also sent a letter to the Tax Court stating she had mailed an original notice of appeal to the Tax Court on February 26, 2002, eighty-one days after the motion for reconsideration was denied. Her letter claimed the original notice of appeal "evidently was destroyed in the mail" and that "[w]e received in our office a mangled representation of we think the appeal." [sic] R. doc 14, letter of April 11, 2002. Counsel's letter contained a photocopy of the original notice of appeal, but no registered or certified receipt and no evidence of the original envelope, its postmark date or its "mangled" contents.

A notice of appeal is deemed delivered on the date of mailing, as established by a United States postmark. 26 U.S.C § 7502(a), (b); 26 C.F.R. § 301.7502-1(b)(iii). Use of registered or certified mail provides prima facie evidence that the notice of appeal was delivered; the date of registration or the date of the U.S. postmark on the certified mail receipt is treated as the postmark date. 26 U.S.C. § 7502(C)(1); 26 C.F.R. 301.7502-1(C)(2). Mr. Zimmerman has presented no evidence that the original notice of appeal was postmarked within the prescribed time period. We have only counsel's unsworn letter and a purported copy of the original notice of appeal to evidence the first attempt at filing a notice of appeal. These items are insufficient as a matter of law to establish timely delivery and filing. Therefore, we dismiss Donald Zimmerman's petition for review as untimely.

2. **Susan Zimmerman's petition**

The Tax Court dismissed Susan Zimmerman's petition for a failure to state a claim upon which relief could be granted. It further denied her motion to reconsider/motion for new trial (which it termed a motion to vacate), because the motion did nothing but repeat arguments previously raised. We review the dismissal of Ms. Zimmerman's Tax Court petition for failure to state a claim *de novo*. *Fox v. Comm'r*, 969 F.2d 951, 952, (10th Cir. 1992). The Tax Court's denial of her motion to vacate is reviewed for an abuse of discretion. *Drobny v. Comm'r*, 113 F.3d 670, 676, (7th Cir. 1997).

Having reviewed the briefs, the record and applicable law in light of the above-referenced standards, we AFFIRM the challenged Tax Court decisions in No. 02-9004 for substantially the same reasons stated in the Tax Court's orders of October 5, 2001 and December 7, 2001. We DISMISS No. 02-9005, for lack of appellate jurisdiction. All pending motions are DENIED.

Entered for the Court

David M. Ebel
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SUSAN ZIMMERMAN, Petitioner – Appellant, v. COMMISSIONER OF INTERNALREVENUE, _ Respondent – Appellee.	No. 02-9004

ORDER
Filed January 7, 2003

Before SEYMOUR, EBEL, and O'BRIEN, Circuit Judges

Susan Zimmerman's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of the Court

by:
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DONALD ZIMMERMAN, Petitioner – Appellant, v. COMMISSIONER OF INTERNAL REVENUE, Respondent – Appellee.	No. 02-9005

ORDER
Filed January 7, 2003

Before SEYMOUR, EBEL, and O'BRIEN, Circuit Judges

Donald Zimmerman's petition for rehearing is denied.

Entered for the Court
PATRICK FISHER, Clerk of the Court

by:
Deputy Clerk